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October 18, 2011

Timothy A. Frazier, *Designated Federal Officer*
U.S. Department of Energy
1000 Independence Avenue, SW.
Washington, DC 20585
brc@nuclear.energy.gov

Re: Nye County comments on the July 29, 2011 Draft Report to the Secretary of Energy from the Blue Ribbon Commission on America's Nuclear Future

Dear Mr. Frazier:

Nye County, Nevada welcomes the opportunity to provide comments on the subject draft report. It is our hope that the following comments will receive the Commission's thoughtful consideration and will be incorporated into the final document.

EXECUTIVE SUMMARY OF PRINCIPAL COMMENTS

1. Nye County, Nevada, agrees with the principal finding and recommendation of the Blue Ribbon Commission ("BRC") ***"that the United States must proceed promptly to develop one or more permanent deep geological facilities for the safe disposal of spent fuel and high-level nuclear waste."***
2. Since BRC determined there is a need to promptly develop a deep geological repository, ***BRC should revise the draft report and include a recommendation that the Nuclear Regulatory Commission ("NRC") complete the pending licensing proceeding*** for the only repository project that can possibly be "promptly developed": the proposed Yucca Mountain repository. A neutral BRC recommendation should call for the Nuclear Regulatory Commission ("NRC") to reach a final decision on the merits of the currently pending Yucca Mountain license application, which took billions of taxpayer dollars to produce.
3. BRC's repeated criticism of Nuclear Waste Policy Act ("NWPA") programs in general, and of progress on the Yucca Mountain proposal in specific, appear to reflect a biased assessment of these complex, bipartisan, statutory programs that would have produced a final, objective determination regarding the safety of the first proposed repository if not for recent political interference.

4. Nye County agrees with BRC's recommendation "that all affected levels of government...must have, at a minimum, a meaningful consultative role in important decisions" and that funding of active local participation in repository activities is essential to its success. Pursuant to the NWPA, Nye County has actively consulted with DOE on every step of the repository project, has provided meaningful oversight of all activities at Yucca Mountain, and is a full party participant in the Yucca Mountain licensing proceeding pending before the NRC.

5. As Nye County has previously informed the BRC, both orally at public hearings and in writing, as the host County for the repository, ***Nye County supports completion of the NRC licensing proceeding, and construction of the project if NRC determines it is safe.*** Numerous other adjoining counties have stated similar support. BRC's findings and recommendations regarding local support for the Yucca Mountain licensing proceeding and for construction and operation of Yucca Mountain repository are based upon the false assumption that the project does not have local support. ***The draft report should be revised and the final report corrected to reflect this local support.***

6. The complex BRC proposal recommending major new research, statutory, regulatory, and social changes and programs as a substitute for the current NWPA framework would take decades to implement, with no guarantee of success, and would be just as vulnerable to last minute political derailment as the Yucca Mountain proceeding.

OVERVIEW

For many decades, Republican and Democrat Administrations alike struggled to find a permanent solution for the safe disposal of high-level nuclear waste and spent nuclear fuel.

When the political parties and other stakeholders finally reached an acceptable compromise on a policy direction for the Nation, that policy was embodied in law as the Nuclear Waste Policy Act ("NWPA"). Adhering to the statutory requirements and scientific and technical criteria for site selection, the Executive and Legislative Branches collectively narrowed site characterization to a single, geologically suitable location for the repository, Yucca Mountain, in Nye County, Nevada, about 100 miles from the nearest major population center, Las Vegas. After the State of Nevada failed multiple times to thwart that selection politically¹ and in federal court, the Department of Energy ("DOE") finally filed a license application ("LA") to construct the repository with the Nuclear Regulatory Commission ("NRC") in 2008.

In accordance with carefully crafted statutory and regulatory licensing requirements, interested state, local government, tribal, and other parties intervened in the LA licensing

1 The State of Nevada even tried to incorporate a new county ("Bullfrog") that encompassed the Yucca Mountain site, with no residents whatsoever, inside of Nye County boundaries in order to control repository oversight and funding at the State level. BRC should recommend that the NWPA be amended to preclude such blatant gerrymandering at the expense of true local government participation in siting and development of nuclear waste repositories and storage facilities.

proceeding, ensuring that all sides on the key issue-- whether or not the facility could be constructed and operated safely-- would be fully heard in a neutral forum. The parties filed approximately three hundred environmental, health, and safety contentions with the assigned NRC Atomic Safety and Licensing Board ("ASLB"). The State of Nevada filed the vast majority of the contentions, re-raising many issues that had already been adjudicated in some form in the past.

The LA adjudication was entering the discovery phase in 2010 and the ASLB was ready to rule on purely legal contentions and proceed with discovery when DOE abruptly announced that it wanted to withdraw its LA with prejudice, **even though DOE still maintained that the repository could be safely built and operated.**² Safety Evaluation Reports (SERs) prepared by NRC staff were nearly complete when the NRC Chairman improperly halted the finalization of the SERs even though the ASLB adjudicatory process was, and still remains, pending.³ An observer of the licensing proceeding need not be a cynic to conclude that the timing of the actions by the Secretary of DOE and NRC's Chairman were based on the fear that the SERs, and the licensing proceeding itself, were about to add weight to the claim that Yucca Mountain could be constructed safely.

President Obama maintained that advances in science and technology demanded a rethinking of the entire back-end of the nuclear fuel cycle and asked DOE to establish this Blue Ribbon Commission ("BRC") and directed it to consider **all** alternatives for the storage, processing, and disposal of civilian and defense spent nuclear fuel and nuclear waste. The BRC has now published a draft report⁴ open for public comment until October 31, 2011.

BRC's report offers numerous suggestions for, in essence, restarting the site selection process and repository licensing. While Nye County agrees in principle with some of the BRC proposed recommendations and seven key strategies for the future, most of those changes can be made **prospectively** for future projects, within the existing NWP framework, without further delaying the Yucca Mountain licensing proceedings. Nye County is deeply concerned that implementation of a new, complex strategy is still dependent upon the cooperation of many diverse parties within the federal government and among state, local and tribal parties, and the public at large. Therefore, implementation of the strategies will assuredly take decades, and may not be implementable at all given political realities. Therefore, Nye County strongly recommends that the BRC support completion of the Yucca Mountain licensing proceeding, without taking a position on the adjudicatory result, for the reasons developed below.

2 Order of ASLB, *In re* Dep't of Energy, NRC No. 63-001, ASLB No. 09-892-HLW-CAB04 (June 29, 2010) at 4 (hereinafter cited as "ASLB Order")

3 The NRC Staff has now issued TERs on safety issues that presents staff findings short of conclusions regarding safety. See note 32 *infra*, and accompanying text.

4 Blue Ribbon Commission on America's Nuclear Future, Draft Report to the Secretary of Energy, July 29, 2011 (hereinafter cited as "Draft Report")

I. YUCCA MOUNTAIN IS THE ONLY REPOSITORY SITE THAT HAS THE POTENTIAL TO BE EXPEDITIOUSLY DEVELOPED

If the BRC's draft report proves nothing else, it shows the BRC has very little new to offer, acknowledging that even if major advances in nuclear fuel reprocessing occur, a geological repository will ultimately be necessary for final disposition of spent nuclear fuel and some defense nuclear waste.⁵

Nye County agrees with the initial finding and recommendation of the BRC: *"Our first recommendation, therefore, is that the United States must proceed promptly to develop one or more permanent deep geological facilities for the safe disposal of spent fuel and high-level nuclear waste."*⁶

Given BRC's "shared sense of urgency"⁷ and determination that a geological repository should be developed promptly, it is difficult to reconcile the report's treatment of the one repository that potentially could be developed promptly, namely Yucca Mountain. Acknowledging the central importance of finding a suitable geological "medium" for nuclear waste disposal; the considerable time it has taken to find such a location; and the fact that a final decision relative to the Yucca Mountain license application was about to be made, the BRC recommendations regarding "proceeding promptly" to establish a repository leads inevitably and logically to a single conclusion. The Yucca Mountain licensing proceeding should be completed as soon as possible. An objective assessment of all relevant factors demonstrates that no other site will be available for decades, even under the most optimistic view of the future.

Now that NRC has finally ruled on DOE's Motion to Withdraw the license application, and left the ASLB denial of DOE's Motion intact as a matter of law,⁸ the BRC has an opportunity to demonstrate its neutrality on Yucca Mountain by revising its final report and recommending that the ALSB continue the licensing proceeding to determine if Yucca Mountain could be constructed and operated safely.

Given the history of the long search for a suitable site for a repository and the amount of effort and resources that have already been invested in the Yucca Mountain licensing adjudication, obtaining a final NRC safety determination is the only "prompt" way to secure the first suitable site for a United States repository. A neutral finding that the ALSB

⁵ For example, the Inter-Agency Group established by President Carter and the works of several national Academy of Science ("NAS") committees have addressed similar issues, particularly in the 2001 NAS study, *Disposition of High-Level Waste and Spent Nuclear Fuel: The Continuing Societal and Technical Challenges*, all point to the same conclusion: but for the politicization of nuclear waste issues, the solution proposed in the NWSA would be nearing completion of significant safety milestones.

⁶ Draft Report at Chapter 4, paragraph 1.

⁷ Draft Report at p. iii.

⁸ U.S. Department of Energy (High-Level Waste Repository), CLI-11-07, 74 NRC __ (Sept. 9, 2011), Slip Op. at 1.

licensing proceeding should continue to its conclusion could and should be made in the final BRC report; such a finding is consistent with BRC's commitment to take no position on the **siting** of actual repository facilities.

While noting what BRC views as numerous deficiencies in the current policy and repository requirements established by the NWPAA, DOE, and NRC, the report fails to emphasize that substantial progress was being made toward a final decision on the LA, and that the new strategies outlined by the BRC are not guaranteed to expeditiously achieve the ultimate goal of safe permanent disposal. Most importantly, if Yucca Mountain is abandoned, and the new strategy and processes outlined by BRC fail, the Nation will have wasted decades of progress achieved under the NWPAA.

Allowing the ASLB adjudication of the LA to proceed would safeguard against such eventuality and would not foreclose the improvements recommended by the BRC for monitored retrievable storage, major organizational changes in the future, modifications in the management of the nuclear waste fund, and a search for a suitable location for a second repository under an improved statutory and regulatory framework.

II. BRC'S REPEATED ASSERTIONS ABOUT THE "DEEPLY FLAWED" NWPAA FRAMEWORK FOR A REPOSITORY ARE NOT SUPPORTED BY FACTS

The BRC draft report asserts that the BRC takes no position on the proposed Yucca Mountain repository or the stalled NRC licensing proceeding.⁹ However, that position is belied by the erroneous or unsupported BRC findings of "flaws" in the NWPAA and Yucca Mountain repository program contained elsewhere in the report.¹⁰ As written, the BRC report can only be interpreted as fully supporting DOE's request to withdraw the Yucca Mountain license application. BRC has an opportunity to correct these errors or misimpressions in its final report.

The BRC describes the NWPAA and the statutorily established Yucca Mountain repository program in the report as "deeply troubled" and "now all but completely broken down."¹¹ BRC contends that "it will cost something to implement a successful U.S. waste management program; however, trying to implement a deeply flawed program is even more costly..."¹² The BRC draft report does not present an even-handed or complete review of the existing programs. The report consistently fails to provide adequate supporting evidence and

⁹ See, e.g., Draft Report at p. vi: "Finally, there are several questions the Commission was not asked to consider and therefore did not address. We have not: Rendered an opinion on the suitability of the Yucca Mountain site or on the request to withdraw the license application for Yucca Mountain. Instead, we focused on developing a sound strategy for future interim storage and permanent disposal facilities and operations that we believe can and should be implemented regardless of what happens with Yucca Mountain."

¹⁰ Draft Report at p. iii.

¹¹ See, e.g., Draft Report at pp. i, iv, vi, xiv.

¹² Draft Report at p. iv.

analysis demonstrating that the current program is "deeply flawed" while identifying alleged deficiencies in the current policy and repository requirements established by the NWPA, DOE, and NRC.

For example, the U.S. repository development program is not characterized by decades of failed efforts, despite BRC conclusion to the contrary.¹³ Rather, the program has advanced at least as far, if not farther, than repository development programs in other nations. Currently, the U.S. repository program is thirteen years behind the schedule outlined in the NWPA, as amended. Significant annual progress to advance the repository development initiative was being accomplished until recent actions by the Administration seeking to terminate the Yucca Mountain program without safety justification for such action. Rather than being viewed as failed efforts, the activities of the past 24 years could be viewed as the results of an adaptive management approach couple with appropriate Congressional control, the very approach recommended by the BRC in its draft report.

Recent political opposition by the Administration and litigation by a single state have been the primary impediments to the timely implementation of the Nuclear Waste Policy Act. A neutral and balanced analysis would have concluded that many of BRC's suggestions for future nuclear waste program are already incorporated in the NWPA and were implemented during the process of siting the Yucca Mountain project.

For example, the BRC recommends "an approach to siting and developing nuclear waste management and disposal facilities in the United States that is adaptive, staged, consent-based, transparent, and standards-and science-based."¹⁴ The NWPA and its implementing regulations contain a carefully worked out balance of all these elements. The siting criteria and identification of potential repository sites were based upon scientific assessments that took years to complete. Moreover, The NWPA and the NRC licensing process are staged to allow neutral consideration of design, construction, and operation issue. The NWPA requires Congressional involvement at each critical stage to insure that any adaptive changes necessary in the national interest are properly taken into account. Federal, State, local and tribal involvement and oversight are provided for at every phase of the process, as demonstrated in more detail in Sections II. and IV. of Nye County's comments.

The BRC also asserts that "[e]ffectively managing the back end of the nuclear fuel cycle requires a vision and a strategy. Both have been lacking in the U.S. waste management program to date."¹⁵ This statement is both misleading and inaccurate. The NWPA is a carefully crafted national strategy and vision for disposal of high level waste that enjoyed bipartisan support until the current President and DOE unilaterally decided to withdraw the Yucca Mountain license application without first seeking Congressional approval. The NWPA policy had endured for more than two decades under changing political landscapes

13 "To be sure, decades of failed efforts to develop a repository for spent fuel and high-level waste have produced frustration and a deep erosion of trust in the federal government." Draft Report at p. xiv.

14 Draft Report at p. xv.

15 Draft Report at Section 2.1, p. 4.

and numerous Administrations. The policies and procedures established in the NWPA were being followed and the waste repository program was gathering momentum. Just as the NWPA policy framework was about to reach fruition in the NRC licensing process, with a possible independent verification that the Yucca Mountain Repository could be constructed safely, the longstanding policy framework was undermined by Executive Branch actions that sidestepped Congressional approval. Had it not been for this political interference, which the BRC apparently will not, or can not acknowledge, the NWPA licensing proceeding for Yucca Mountain, although delayed, should now be close to completion, with an NRC final decision on relevant safety issues.

The BRC's appropriate insistence on "transparency" and "fairness" in nuclear waste decision-making is ironic.¹⁶ The most transparent and objective feature in the consideration of the proposed repository is the ASLB licensing proceeding. The adjudication is conducted by neutral administrative judges and technical experts. Any party with a stake in the licensing proceeding may intervene as a party and file safety and environmental contentions. Evidence is presented in a public adjudicatory setting governed by rules similar to those in federal court. The only non-transparent action under the NWPA to date has been the DOE's and NRC's politically motivated interference with the statutory ASLB licensing process for reasons unrelated to safety.

The BRC contention that had the Administration not halted the Yucca program, the LA would have led to "further controversy, litigation, and protracted delay"¹⁷ turns the current situation on its head. Yes, there is an opportunity for judicial review of a final NRC decision on the repository license application. However, it was DOE's attempt to unilaterally withdraw the application, on grounds other than safety, and NRC's inexcusable delay in ruling on DOE's Motion to Withdraw that led to "further controversy [involving NRC's Inspector General, Congress, and the Courts], litigation, and protracted delay". DOE and the NRC Chairman's actions prevented the ASLB and NRC from meeting their statutory responsibility to rule on the safety merits of the LA within the three or four year period required by law.¹⁸

Regarding the setting of regulatory standards, BRC starts with the admission that EPA and NRC should retain their respective roles in setting the repository safety and environmental standards.¹⁹ Both agencies, together with the National Academies of Science, were directly involved in the setting of science-based standards and procedures for the Yucca Mountain repository under the NWPA, and the standard-setting process took from 1987 to 2005. There is no reason to believe that new and presumably better regulations could be promulgated and implemented, without litigation, any faster.

16 Draft Report at p. 7

17 Draft Report at p. iii.

18 NWPA, 42 U.S.C. § 10134(d).

19 Draft Report at p. vii.

In this regard, the BRC recommends the following: "Safety and other performance standards and regulations should be finalized prior to the site-selection process."²⁰ BRC also recommends that EPA "complete this process in a thorough and timely way." Nye County agrees with those goals for future projects, and notes that thorough and effective standards have been painstakingly achieved with respect to the Yucca Mountain repository, although not as quickly as many would have wanted. As noted elsewhere in the BRC report, it took EPA 16 years to establish the current Yucca Mountain standard. By requiring standards to be completed upfront, the effort to find a second repository might be delayed for decades.

Moreover, despite the implications in the BRC report, there is no reason to believe that the current safety and radiological standards for Yucca Mountain are inadequate for the current proposal or for future repositories. In fact they are probably overly conservative.

During a discussion of the nature of radiation hazards, BRC report correctly states, "Human beings are exposed continuously to very low levels of naturally-occurring and man-made radiation (see text box and figure 7)."²¹ To put this information in proper perspective, as documented in DOE's Yucca Mountain license application, the estimated highest annual dose to a hypothetical Nye County resident living closer than anyone actually does to Yucca Mountain would be less than 3 microSieverts for 10,000 years and less than 30 microSieverts for a million years.²² That means that for over one million years, the highest reasonably estimated dose to any individual resulting from a repository at Yucca Mountain would be equivalent to adding 3 days of background exposure to the individual and less than the radiation dose received by someone flying from New York to Los Angeles (40 microSieverts per Figure 7). In fact, the BRC members received a much higher radiation dose by flying from meeting to meeting than any member of the public ever would from the proposed Yucca Mountain Repository.

The BRC report further states that "the public are entitled to a clear understanding of how decisions were reached and how different values and interests were considered and resolved in the process."²³ Following its own advice, the BRC should demand that the Administration provide a fuller explanation of why it makes sense to abandon decades of work and tens of billions of dollars in the hope of devising a "better" disposal option than Yucca Mountain, when the radiation levels anyone could possibly receive are much lower than the "very low levels of naturally occurring and man-made radiation" shown in Figure 7 of BRC's report.

20 Draft Report at Section 9.3, page 104.

21 Draft Report, Section 3.2, p. 14, Figure 7 shows radiation doses of varying levels and the hazard posed at higher levels. In particular, the figure shows a dental x-ray produces about a 5 microSievert dose; daily background radiation to an average individual is about 10 microSieverts; a chest x-ray exposes an individual to about 100 microSieverts; and at 100 milliSieverts (an annual dose 10,000 times background radiation), effects of lifetime risk of cancer become evident.

22 DOE License Application at Figure 2.4-10

23 Draft Report at p. 8

Given the BRC's commitment to research into fundamental issues related to storage and disposal of nuclear waste expressed elsewhere in the report²⁴ it is difficult to understand why BRC does not support capturing the value represented by billions of taxpayers' dollars already expended in examining the Yucca Mountain proposal. That capture would be accomplished by a final determination by the ASLB on whether or not repository construction could proceed safely. Such information would prove invaluable to future repository efforts, regardless of the NRC decision on the merits, as even the Administration acknowledged in 2010.

BRC devotes an entire section of its report to the concept of a consent-based approach to siting and development of a nuclear waste repository, and the need for local involvement and acceptance of the project.²⁵ Because Nye County is the local government host for the proposed Yucca Mountain project, the County has a unique perspective on this recommendation—a perspective that has been ignored by the BRC. Therefore, the following section of Nye County's comments will be devoted to that issue.

III. THE BRC FAILS TO ACKNOWLEDGE NATIONAL AND LOCAL SUPPORT FOR THE YUCCA MOUNTAIN LICENSING PROCEEDING AND DRAWS A FALSE CONTRAST BETWEEN SUPPORT FOR YUCCA MOUNTAIN AND WIPP

BRC insists that the siting of any repository be "consent based" with the support and cooperation of the local communities surrounding the project.²⁶ These statements falsely imply that such factors were not properly accounted for previously under the NWPFA framework, and that unanimous support for any major project is possible in this era of "not in my back yard" ("NIMBY"). Indeed, the BRC admits that federal decision makers must ultimately "be willing to move forward without full consensus."²⁷

Regarding the first point, the BRC fails to provide a rigorous analysis of the numerous provisions in the NWPFA that require just such local involvement. For example, several discrete provisions of the Act call for oversight of DOE's siting, construction, and operation of a nuclear waste repository by affected units of local government, tribes, and states at federal expense.²⁸ More importantly, the BRC draft report also fails to acknowledge that Nye County, Nevada, which is the local County host for the proposed Repository, has from the outset supported the Yucca Mountain project, provided NRC ultimately determines that the project can be safely constructed and operated. Nye County has informed BRC of its support for the licensing proceeding in its previous comments.²⁹ Nye County has now been joined by five other adjoining counties in support of continuing the Yucca Mountain project licensing proceeding. Indeed, broad national support over many decades for the NWPFA framework persists, and is not counterbalanced by the State of Nevada's opposition.

24 See, e.g., Draft Report at Ch. 10,

25 Draft Report at Ch. 6

26 Draft Report at pp. iv; Ch. 6 at pp. 56-71.

27 Draft Report at section 2.3.8 at p.8.

28 See, e.g., NWPFA, 42 U.S.C. §§ 10136, 10137; 10138.

29 Nye County Letter to the BRC (February 7, 2011).

More than two dozen prominent national, state, local and Native American organizations have written to the U.S. Senate expressing their support for the resumption of the Yucca Mountain license review by NRC's ASLB and related licensing-support activities at DOE. The 26 organizations -- which comprise a cross-section of energy consumers, regulators, elected officials, Native Americans and community entities and businesses -- include the National Association of Regulatory Utility Commissioners, U.S. Chamber of Commerce, Prairie Island Indian Community, U.S. Nuclear Infrastructure Council, Institute for 21st Century Energy, Nuclear Waste Strategy Coalition, U.S. Nuclear Energy Foundation and the Sustainable Fuel Cycle Task Force. Referring to the above-stated findings by the BRC and by Congress, the letter states that "we agree that the need for the Federal government to meet its responsibility for commercial spent fuel and defense waste management under the Nuclear Waste Policy Act is a matter of urgency -- and that further delay is only exacerbating taxpayer liability and diminishing confidence in resolution of this national concern."³⁰

The fact that the State of Nevada and Clark County, Nevada, have consistently opposed the project, not based upon proven safety flaws, but upon the fear of loss of tourism in Las Vegas, should not prevent the licensing process from reaching a conclusion on the basic safety issues.. The ASLB assigned to the proceeding has already dismissed the purely legal contentions filed by Nevada and supported by Clark County, and has yet to sustain a single safety contention filed by any party.³¹ NRC staff Safety Evaluation Reports, although stripped of their technical conclusions regarding the safety of the repository construction, and issued instead as Technical Evaluation Reports³² at the direction of the NRC Chair, leave little doubt that staff believed that there were no major irresolvable safety issues with the LA.

³³ For example, the various DOE calculations of possible radiation exposures from the

30 Letter from Sustainable Fuel Cycle Task Force to United States Senate (September 15, 2011) at p. 2.

31 Memorandum and Order of ASLB, *In re* Dep't of Energy, NRC No. 63-001-HLW, ASLB No. 09-892-HLW-CAB04 (Dec. 14, 2010) at pp. 1-35.

32 [NUREG-1949, Volume 1](#), "Safety Evaluation Report Related to Disposal of High-Level Radioactive Wastes in a Geologic Repository at Yucca Mountain, Nevada; Volume 1: General Information" (Note that Volume 1 was issued as a Safety Evaluation Report. The title page includes the notation: "Manuscript Completed: August 2010, Date Published: August 2010"); [NUREG-2107](#), "Technical Evaluation Report on the Content of the U.S. Department of Energy's Yucca Mountain Repository License Application; Postclosure Volume: Repository Safety After Permanent Closure." (ML11223A273) (Note that this is what would have been Volume 3 of the SER had NRC issued the postclosure volume as an SER. The title page includes the notation: "Manuscript Completed: July 2011, Date Published: August 2011"); [NUREG-2108](#), "Technical Evaluation Report on the Content of the U.S. Department of Energy's Yucca Mountain Repository License Application; Preclosure Volume: Repository Safety Before Permanent Closure" (ML11250A093) (Note that this would have been SER Volume 2. The title page includes the notation: "Manuscript Completed: August 2011, Date Published: September 2011"); [NUREG-2109](#), "Technical Evaluation Report on the Content of the U.S. Department of Energy's Yucca Mountain Repository License Application; Administrative and Programmatic Volume" (ML11255A002) (Note that this would have been SER Volume 4. The title page includes the notation: "Manuscript Completed: September 2011, Date Published: September 2011")

33 In the Introduction to the TER on postclosure issues, the NRC staff notes that the "TER was developed using the regulations at 10 CFR Part 63 and guidance in the Yucca Mountain Review Plan (YMRP). The TER does not, however, include conclusions as to whether or not DOE satisfies the Commission's regulations." [NUREG-2107](#), "Technical Evaluation Report on the Content of the U.S. Department of Energy's Yucca Mountain Repository License Application; Postclosure Volume: Repository Safety After Permanent Closure."

repository meet the regulatory requirements in 10 C.F.R. Part 63, and, in fact, such exposures are much lower than required. The NRC staff reviewed the SAR and other information DOE submitted in support of its calculations and concluded the following: "DOE submitted information consistent with the guidance in the YMRP. Specifically, NRC staff notes that the repository (i) is composed of multiple barriers; (ii) the Total Systems Performance Assessments (TSPAs) used for **the individual protection, human intrusion, and separate groundwater protection calculations are reasonable; and (iii) the technical approach and results in DOE's TSPA, including the average annual dose values and the performance of the repository barriers, discussed in this TER, are reasonable.**"³⁴ Thus, the NRC staff did, in essence, conclude that key safety features incorporated in DOE's license application met NRC regulatory safety requirements.

BRC is also well aware that unanimous backing, or even consensus support, for any major federal project is often unachievable, even if the project is located on federal lands, as Yucca Mountain is. The reasons are political, not sound science. A "consent based" approach advocated by the BRC is preferable, but hardly the most important siting factor. The primary discriminator must be the scientific and technical suitability of the disposal medium. As our experience under the NWPA demonstrates, the technical site evaluation is a long and difficult process. Once that determination is made for one or more sites, then and only then, should cultural and political factors be weighed in the siting process. That is the approach taken in the NWPA.

When the NWPA was drafted, the Governors of the fifty States recognized this reality and recommended that the NWPA not grant the selected host state veto power over siting of the repository, knowing full well that political realities, rather than technical considerations, would make it virtually impossible for any governor to approve of the siting. Instead, the NWPA gave the governor of the host state the right to file an objection, and Congress and the President the ability to over-ride that objection. That is in fact what happened with the Yucca Mountain siting, and would almost certainly happen again with the siting in most, if not all, of the other forty-nine states.³⁵

Nor are the BRC's asserted differences between the local support for the Waste Isolation Pilot Project ("WIPP") in New Mexico and at Yucca Mountain in Nevada legitimate.³⁶ Both New Mexico and Nevada used litigation to oppose the nuclear waste projects in their respective state. The key difference between WIPP and Yucca are not the ones that are articulated by the BRC, but rather DOE's willingness to fully litigate the issues in WIPP and continue to stay the course in New Mexico, but not at Yucca Mountain. EPA

(ML11223A273) (The title page includes the notation: "Manuscript Completed: July 2011, Date Published: August 2011") at p.1, Introduction

34 *Id.* at p. xxii. (emphasis added)

35 The Draft Report at Section 3.4.2 on page 24 discusses previous efforts to find a volunteer state for a repository site. It notes there were several communities interested but, "In no case, however, was a host state supportive of having the process go forward." A sober assessment of the future indicates state politics are unlikely to change in the future.

36 Draft Report at p. 21

has been involved in the standards development process for both projects. The host local communities eventually supported the project at WIPP, and from the outset at Yucca Mountain, so long as they were constructed and operated safely. The experts on the BRC are well aware of the difference between perceived and actual risks, but fail to note that the local support in New Mexico measurably strengthened **after** the WIPP facility was constructed and operated safely for several years. Once a project is completed, and benefits are accrued from a project, irrational fears and misunderstanding that persist before a project is built can be overcome. Sometimes, a vilified project becomes not only accepted, but welcomed by the community, as was the case with offshore wind turbines which now produce a substantial portion of the electricity for the people of Denmark, who were decidedly opposed the project before it was built.³⁷

BRC should revise its report to accurately reflect the existing local support for the Yucca Mountain project, draw more balanced comparisons between Yucca Mountain and WIPP, and acknowledge that the NWPA provisions for taking into account the opposition of a host state are not only adequate, but the only possible compromise.

IV. IN ESSENCE, THE BRC RECOMMENDS STARTING OVER AGAIN WITH ESTABLISHING REPOSITORY POLICY AND THE SITING PROCESS WITH NO ASSURANCE OF SUCCESS IN THE END

BRC's recommendation in Chapter 6 for a "...new approach to siting and developing nuclear waste management and disposal facilities in the future" is in essence a suggestion for starting over with the entire process of finding sites for repositories.³⁸ To accomplish this goal, the BRC has made a series of sweeping recommendations regarding establishing and funding a new independent organization for the handling of nuclear fuel disposal, changes to the management of the nuclear waste fund paid into by the utilities, accelerated development of interim storage,³⁹ new siting criteria for facilities, and research both nationally and internationally—all of which require time, resources, and in most cases, statutory changes.

BRC's recommendations collectively amount to starting over and, as a result, the Nation would face 20 or more years to simply get back to where the YM program is now—with no assurance of greater support than is present now. BRC's analysis of the need for local acceptance of the repository siting, and its failure to acknowledge the level of acceptance that Yucca Mountain has received, indicate that BRC is selectively reviewing the facts regarding the NWPA's implementation. Throughout the report, the BRC criticized ways in which the Yucca Mountain project has progressed by making a false comparison

37 Melnyk & Andersen, OFFSHORE POWER, *Building Renewable Energy Projects in U.S. Waters* (PennWell 2009) at 94, 224-225.

38 Draft Report at p. vii.

39 The NWPA already provides for Monitored Retrievable Storage ("MRS") facilities, which Nye County believes should either be co-located with the first repository, or built elsewhere, but only after the first repository is licensed. Allowing MRSs to be built before a permanent repository is licensed runs the very real risk of the MRSs being improperly treated, de facto, as a substitute for a repository, as the BRC acknowledges.

with the idealized way the BRC postulates site designation should proceed in the future--without doing a reality check. Site designation under the BRC proposal will take enormous amount of time and resources with no more guarantee of success than under the NWPB.

For example, the BRC concludes that “...a new, single-purpose organization is needed to develop and implement a focused, integrated program for the transportation, storage, and disposal of nuclear waste in the United States.”⁴⁰ Assuming such a proposal ever achieves Executive and Legislative Branch approval, and stakeholder support, the new organization will be confronted with all the same challenges that hampered the DOE. There will always be political control on spending. The constancy of leadership for the nuclear waste program is the single most important element of success for any entity responsible for the repository program. The tenure of the individual that heads the organization must be more than the one to two years characterized by the current NWPB program heads.

More importantly, there is nothing fundamentally new in most of the BRC recommendations. The history of the NWPB itself and the evolution of the process over time included each and every one of the five siting processes included in this BRC recommendation. The option for a state to veto the site recommendation was considered and rejected, with sound justification, during deliberations on the NWPB. Any consent-based process must be subordinate to a rigorous scientific and technical process as discussed previously. BRC implies that the process of involving state and locals just needs to be done better, with greater efforts to involve and educate the host population. However, educating the general public on nuclear safety and risk has not been achievable, despite enormous effort by EPA, DOE, the National Academies of Science, and most of the academic community, especially when some advocates are willing to equate such disparate situations as Three Mile Island and Chernobyl in an effort to enflame public sentiment against nuclear power. Public perception of risk for nuclear matters is much higher than actual risk.⁴¹ The report fails to demonstrate how the general perception of nuclear risk will be changed in the future without fundamental upgrades in U.S. education policy and the scientific education level of the general public.

⁴⁰ Draft Report at p. viii, and Ch. 7, p. 72.

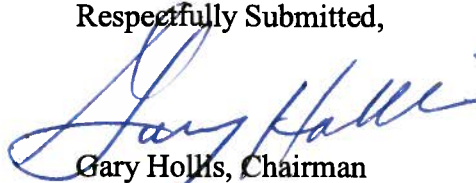
⁴¹ Stephen Breyer, *BREAKING THE VICIOUS CIRCLE, Toward Effective Risk Regulation* (1992 Harvard University Press) at p. 21

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CONCLUSION

For all of the above-sated reasons, Nye County, Nevada, the host County for the Yucca Mountain Nuclear Waste Repository, requests that the BRC revise its draft report consistent with the foregoing comments to: (1) accurately reflect the amount of local support for the Yucca Mountain licensing proceeding; (2) recommend that the pending ASLB licensing proceeding continue until a decision is made on the safety merits of DOE's license application; and (3) provide a more balanced assessment of the NWPAs programs already in place. Should you have questions regarding these comments, please contact Robert M. Andersen, Akerman Senterfitt LLP, counsel to Nye County on Yucca Mountain issues, at 202 824-1723 or by email at robert.andersen@akerman.com

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Gary Hollis", is written over the typed name.

Gary Hollis, Chairman
On behalf of the entire Nye County Nevada
Board of County Commissioners

GH/ep

Cc: Nye County Board of County Commissioners
Robert M. Andersen, Akerman Senterfitt LLP

Enclosures